

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

**11578243 CANADA, INC., D/B/A
BLACKOXYGEN ORGANICS,
BLACKOXYGEN ORGANICS USA, INC.,
MARC SAINT-ONGE AND CARLO
GARIBALDI,**

Plaintiffs,

V.

DAVID BYKOWSKI

Defendant

CIVIL ACTION NO. 5:21-cv-880

PLAINTIFFS' ORIGINAL COMPLAINT

Plaintiffs 11578243 Canada, Inc. d/b/a BlackOxygen Organics, BlackOxygen Organics USA, Inc., Marc Saint-Onge and Carlo Garibaldi file this Original Complaint against David Bykowski and respectfully show the Court as follows:

PARTIES AND SERVICE

1. Plaintiff 11578243 Canada, Inc. d/b/a BlackOxygen Organics is a Canadian corporation with its principal place of business in Ontario, Canada.
2. Plaintiff BlackOxygen Organics USA, Inc. is a Wyoming corporation with its principal place of business in Sheridan, Wyoming.
3. Plaintiff Marc Saint-Onge is a natural person and Canadian citizen who resides in Ontario, Canada.
4. Plaintiff Carlo Garibaldi is a natural person and Canadian citizen who resides in Ontario, Canada.

5. Defendant David Bykowski is a natural person and a Texas resident. He may be served at 16465 Henderson Pass, Apartment No. 1314, San Antonio, Texas 78232.

JURISDICTION AND VENUE

6. Subject matter jurisdiction is based upon complete diversity of citizenship of the parties, and the amount in controversy exceeds \$75,000, excluding interest and costs in accordance with 28 U.S.C. §1332. The Court also has subject matter jurisdiction pursuant to 28 U.S.C. §1331 and 18 U.S.C. §1694(a).

7. The Court has personal jurisdiction over the Defendant because he is a Texas resident.

8. Venue is proper in this Court as it is in this District that at least part of the acts, omissions and injuries giving rise to the Plaintiffs' claims occurred. Venue is further proper pursuant to 18 U.S.C. 1965.

FACTUAL BACKGROUND

BlackOxygen Organics' Direct Sales Program

9. Plaintiff 11578243 Canada, Inc. d/b/a BlackOxygen Organics is a direct sales, multi-level marketing company that markets fulvic acid-based nutritional supplements under its own name. Plaintiff BlackOxygen Organics USA, Inc. is a wholly owned affiliate of 11578243 Canada, Inc. Except where stated otherwise in this Complaint, these entities are collectively referred to as "BlackOxygen Organics."

10. Plaintiff Marc Saint-Onge ("Mr. Saint-Onge") is the founder, owner and Chief Executive Officer of the BlackOxygen Entities. Mr. Saint-Onge is also the formulator of the company's nutritional products. Plaintiff Carlo Garibaldi ("Mr. Garibaldi") is the President of the BlackOxygen Entities.

11. BlackOxygen Organics does not sell the BlackOxygen products in retail stores; rather, the products are sold through individual independent distributors in the U.S. and Canada known as “Brand Partners.” To become a BlackOxygen Brand Partner, an applicant must pay a nominal fee and sign a “BlackOxygen Organics Brand Partner Application and Agreement” in which the Brand Partner agrees to various contractual terms and the BlackOxygen Organics Policies and Procedures.

12. Upon becoming a Brand Partner, a new Brand Partner is placed under an existing Brand Partner who is referred to as the new Brand Partner’s “sponsor” or “upline.” Brand Partners under a particular sponsor are referred to as the sponsor’s “downline.” A downline sales organization can consist of a sponsoring Brand Partner and hundreds of downline Brand Partners. As noted above, BlackOxygen Organics enters into a separate contractual relationship with each of its Brand Partners. The company therefore has a legally protectable relationship with each Brand Partner. In contrast, no agreements or contractual relationships exist between a Brand Partner and the other Brand Partners in her or his downline sales organization.

13. A key element of BlackOxygen Organics’ success is the identification and retention of productive Brand Partners and the mechanism to incentivize Brand Partners through the company’s multi-level compensation plan. By achieving certain sales levels, Brand Partners can advance to higher levels in the BlackOxygen Organics compensation plan which entitles Brand Partners to earn compensation and rewards based on their sales of products as well as the sales by other Brand Partners whom they have sponsored to join BlackOxygen Organics.

14. Other direct sales companies also utilize sales programs similar to BlackOxygen Organics to sell products through independent sales representatives. While the products sold by other direct sales companies may differ, the business “opportunity” is competitive as between direct sales companies. Each direct sales company seeks to attract the same limited pool of people

interested, trained and capable of selling the companies' products and recruiting others to do the same.

15. Critical to the company's success in the highly competitive direct sales market is BlackOxygen Organics' excellent reputation for high quality products. BlackOxygen Organics is highly reputable and carefully adheres to all regulations, government guidelines and recognized industry ethical standards.

Bykowski's Brand Partner Agreement is Terminated

16. Defendant Dave Bykowski applied to become a BlackOxygen Organics Brand Partner by submitting a Brand Partner Application and Agreement in 2019. Bykowski, however, was frequently disruptive and a constant source of frustration to Messrs. Saint-Onge and Garibaldi and other Brand Partners. After repeated requests to Bykowski to refrain from his constant disruptive and harassing behavior, BlackOxygen Organics terminated Bykowski's Brand Partner Agreement on March 13, 2021. (*App. 7*).¹

17. Following the termination of Bykowski's Brand Partner Agreement, Bykowski attempted to convince Messrs. Saint-Onge and Garibaldi to rescind the termination.

18. In an email to Mr. Saint-Onge dated March 13, 2021, Bykowski referred to Saint-Onge as "*a man of high integrity*." (*App. 9*).

19. In a subsequent email dated March 15, 2021, addressed to Messrs. Saint-Onge and Garibaldi and Brand Partner Brian Smith, Bykowski stated the following:

".....I realize I should have held back and stayed out of the way and I apologize for my mistakes. I promise to change my approach and be more understanding in the future and support the needs and requests of my people and company directions.....I will do anything to stay involved in [BlackOxygen Organics] and I will respect your every wish and directive and I will support the business direction and opportunity without fail....I pledge my total commitment and heart to this

¹ Referenced documents are contained in the Appendix, which has been filed contemporaneously with this Original Complaint, and are referenced as "App ____."

company and this business. I love this company and product and I love you guys and I am sorry I let you down...” (App. 11).

20. In an email dated March 17, 2021, addressed to Messrs. Saint-Onge and Garibaldi, Bykowski stated the following:

“.....Looking at a future void of [BlackOxygen Organics] is very gloomy and if I am blessed enough for you to give me a chance I will never let you down again. God bless you both.....” (App. 13).

21. Despite Bykowski’s requests for reinstatement, BlackOxygen Organics declined to reverse the termination of Bykowski’s Brand Partner Agreement.

The Extortion Scheme Begins

22. Following the company’s refusal to reinstate his Brand Partner Agreement, Bykowski has orchestrated a systematic, fraudulent shakedown scheme via the internet and social media campaigns in an attempt to extort money from BlackOxygen Organics and smear the companies’ reputation, products and ownership.

23. Beginning in April 2021, Bykowski began posting videos on the social media site YouTube which contain false and disparaging statements about BlackOxygen Organics and Messrs. Saint-Onge and Garibaldi. In a video dated April 7, 2021, Bykowski falsely states that Messrs. Saint-Onge and Garibaldi are greedy” and that Mr. Saint-Onge is a “flunky” with no direct sales/MLM experience. Bykowski further falsely states that Mr. Garibaldi, who is married, has engaged in extramarital infidelity by “chasing Colombian women.” Bykowski further suggests that successful Brand Partners should “run” from BlackOxygen Organics because the company is “destined to fail.” Notably, Bykowski repeatedly states in the video that BlackOxygen Organics has “a great product.” Bykowski then concludes the video by promoting a competing fulvic acid company. This video is posted at <https://www.youtube.com/watch?v=7sVugJonWDY&t=7s>.

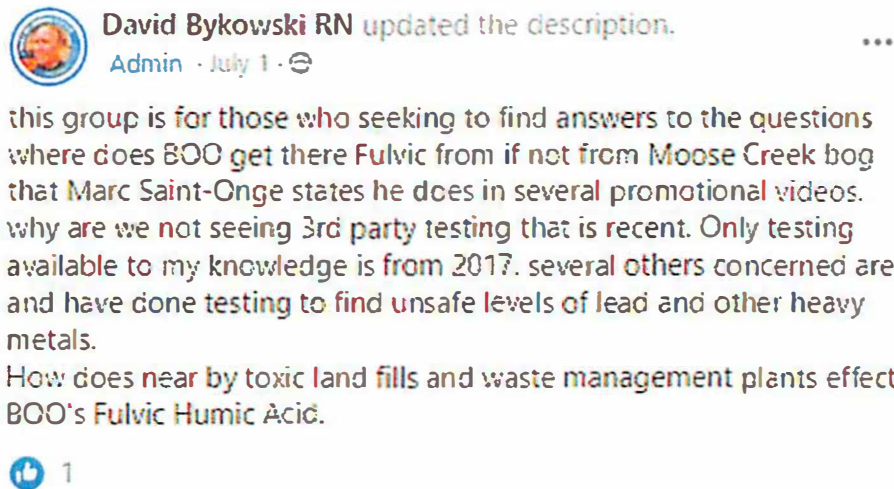
24. On April 16, 2021, an attorney for BlackOxygen Organics sent a cease and desist letter demanding that he cease and desist from publishing disparaging statements about the company and its management. (*App. 15-16*). Bykowski, however, refused to comply with this demand.

25. In a video posted on YouTube on June 28, 2021, Bykowski repeats many of the statements made in the April 7, 2021, video. He refers to Messrs. St. Onge and Garibaldi as “greedy” and “not honest.” Although he repeats his assertion that BlackOxygen Organics has great products, he suggests that BlackOxygen Organics products are not adequately tested and/or inspected prior to sale to the public. As in the April 7, 2021, video, Bykowski concludes the video by promoting his involvement with another company that markets fulvic acid nutritional products. This video is posted at <https://www.youtube.com/watch?v=7cB0om7IP2c>.

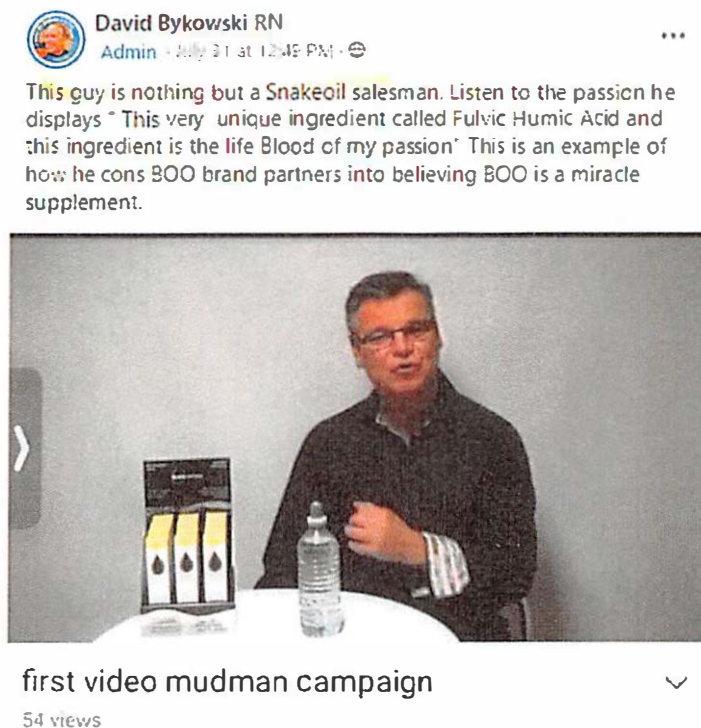
26. Bykowski has published additional videos on YouTube making similar statements and suggesting that BlackOxygen Organics needs “to be put out of business.”

27. In addition to posting videos on YouTube, Bykowski is an administrator for a Facebook private group page called “BOO – Seekers of the Truth.” Bykowski has used this group forum to publish false, misleading and disparaging statements about BlackOxygen Organics and Mr. Saint-Onge, including but not limited to the following:

- (i) BlackOxygen Organics does not regularly test its products and suggestion that the products have unsafe levels of lead and heavy metals; (*App. 27*)



- (ii) BlackOxygen Organics products have been sold “illegally” in Canada (July 30, 2021 Facebook post); (*App.* 28)
- (iii) Mr. Saint-Onge is “nothing but a Snakeoil salesman;” (*App.* 29)



- (iv) BlackOxygen Organics products contain human or animal feces. “Brand Partners and customers are literally eating shit;” (*App.* 30)

David Bykowski RN
Admin · July 29 · 🌐

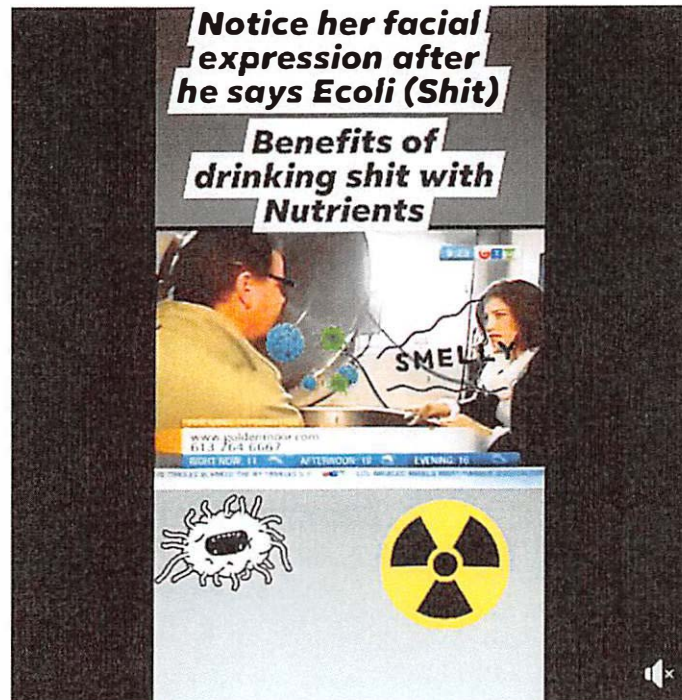
Brand Partners and customers are literally eating shit. Ecoli comes from shit!!!!



- (v) BlackOxygen Organics products may contain streptococcus, the bacteria that causes strep throat; (*App. 31*)

David Bykowski RN shared a post.
Admin · July 31 at 1:29 PM · 🌐

Unbelievable



David Bykowski RN
July 30 · 🌐

Boo consumers beware of ingesting Ecoli and or streptococcus

- (vi) BlackOxygen Organics products contain only 5% fulvic acid and are “equivalent” to lawn fertilizer (July 31, 2021, Facebook post); (*App.* 33)
- (vii) BlackOxygen products are “nothing but SNAKEOIL and its CEO Marc Saint-Onge is nothing but a Snakeoil salesman” and suggestion that the company’s products come from a landfill; (*App.* 35).



David Bykowski RN

Admin · August 6 at 10:03 AM · 🌐

...

Boo is nothing but SNAKEOIL and it's CEO
Marc Saint-Onge is nothing but a Snakeoil salesman. The proof is in
the Landfill BOG!!!!

- (viii) BlackOxygen Organics products come from a toxic source; (*App.* 41)



David Bykowski RN

Admin · August 19 at 7:45 PM · 🌐

...

Announcing our 400th member. Winner of a lifetime of BOO fresh
from the toxic Moose Creek Bog.
Just kidding me 🤔🤔🤔🤔

- (ix) Comparing BlackOxygen Organics products to food made from human remains; (*App.* 42); and



David Bykowski RN shared a link.

Admin · August 19 at 11:39 AM · 🌐

...

Soylent Green was a type food that people were addicted to. The
1973 film
Soylent Green, which starred Charlton Heston set in the year 2022
ended with a (spoiler alert) the horrifying reveal was that the wafers
were actually made from human remains.
Sound creepy and slightly familiar 🤔🤔🤔🤔

- (x) Suggesting that BlackOxygen Organics products “could very well
be tainted. (*App.* 43)



David Bykowski RN shared a link.

Admin · August 21 at 11:17 AM · 🌐

...

This journey began not when I was terminated but when it was brought to my attention that BOO could very well be tainted. It has been a journey that has seen the numbers of detractors grow. Every movement needs a theme song I have chose it

The Sound of Silence

By Disturbed

Please comment your thoughts

28. Through the videos he has posted on YouTube and posts shared on Facebook, Bykowski has attracted a large following of consumers alarmed by the false statements published by Bykowski and the bogus threat to public health that Bykowski has contrived by making false claims about BlackOxygen Organics and its products. BlackOxygen Organics is aware of at least 12 videos about the company posted online by Bykowski. These videos have been viewed more than 5,000 times.

29. To be clear, Bykowski's motive in publishing false statements about BlackOxygen Organics, its products and Messrs. Saint-Onge and Garibaldi is not to alert the public about a company that sells contaminated or harmful products. Rather, Bykowski's motive is to extort money and smear BlackOxygen Organics. In an email to Saint-Onge and Garibaldi dated July 31, 2021, Bykowski stated as follows:

"So here is my proposal \$200,000.. \$100,000 paid by the end of August and \$20,000 paid over 5 months, September, October, November, December and January.....If you decide to except [sic] this settlement I will sign any documents that request I take down all my YouTube videos and refrain from any further posts about BlackOxygen Organics as well as other language you request to be added....I have not even begun to reek [sic] the havoc I will continue to reek [sic] if you refuse this offer...." (App. 20-21)

Bykowski Makes Good on His Threat to “Wreak Havoc”

30. Saint-Onge and Garibaldi refused to agree to Bykowski’s extortion demand and since that time Bykowski has made good on his promise to “wreak havoc” against BlackOxygen Organics and its owners.

31. In August 2021, Bykowski encouraged members of his Facebook group and others to file complaints about BlackOxygen Organics products with Health Canada, the Canadian agency that regulates consumable products, and the U.S. Food and Drug Administration. Plaintiffs believe that almost all of the complaints were submitted by persons who have neither purchased nor consumed BlackOxygen Organics products and who instead were acting based upon the false and misleading information Bykowski has published in his online videos and Facebook posts.

32. Bykowski’s plan to “wreak havoc” has been successful. In August 2021, Health Canada began an investigation of BlackOxygen Organics products which resulted in a recall of BlackOxygen Organics products in Canada. As a result of this action, 11578243 Canada, Inc. d/b/a BlackOxygen Organics has experienced a loss of revenue from Canada sales of approximately \$20,000 (CA) per day since August 17, resulting in significant lost profits. (*App. 4*)

33. Bykowski’s campaign to “wreak havoc” has also significantly impacted BlackOxygen Organics’ sales in the U.S. After Bykowski began publishing false and disparaging statements about BlackOxygen Organics, the FDA put a hold on the sale of the companies’ products in the U.S. This has prevented BlackOxygen Organics from selling products in the U.S. market since August 18, 2021, resulting in a catastrophic loss of revenue and profits. Before Bykowski began his extortion campaign, BlackOxygen Organics’ revenues in the U.S. were growing at a rate of more than 100% per month. This growth slowed to 25% in July 2021, 9% in August 2021 and in September 2021 the company projects a significant decline in sales.

34. Following the events described above, Bykowski gloated in an email dated August 28, 2021:

"I said I would shut them down and I meant it. I am behind it all. The FDA the Health Canada recall." (App. 23)

35. In addition to posting false and disparaging statements about BlackOxygen Organics online, Bykowski's extortion campaign has extended to harassment of existing BlackOxygen Organics Brand Partners. On September 3, 2021, Bykowski left two threatening voice messages to Brand Partner Scottie Schmitz. Prior to this, Mr. Schmitz had never met or spoken with Bykowski. In one of these messages, Bykowski calls Mr. Schmitt 'a piece of shit' and "a chicken shit." In the other message, Bykowski refers to Mr. Garibaldi as a "pervert." (*App. 24*). At least one Brand Partner in Mr. Schmitt's downline has quit their BlackOxygen Organics business based upon Bykowski's false and disparaging videos and social media posts. (*App. 25*).

36. On or about August 25, 2021, Bykowski had a phone conversation with Brand partner Cheryl Prince. In this phone call, Bykowski stated to Ms. Prince that Mr. Garibaldi had sent a video of himself masturbating to one or more BlackOxygen Brand Partners. This statement is false and malicious. Also, during this conversation, Bykowski again gloated about being the person responsible for stopping the sale of BlackOxygen Organics products in Canada and orchestrating the flood of complaints to the Canadian and U.S. regulatory agencies. Bykowski told Ms. Prince that he was going to do everything he could to "take down BOO." At the end of the call, Bykowski attempted to recruit Ms. Prince to join Bykowski in the new fulvic acid company he is working with.

37. The actions and statements of Bykowski described above amount to nothing more than a vicious smear campaign intended to cause economic harm to BlackOxygen Organics and

extort money. This smear campaign has significantly harmed BlackOxygen's business and the respective business and personal reputations of Saint-Onge and Garibaldi. (*App.* 5).

CAUSES OF ACTION

COUNT 1: BUSINESS DISPARAGEMENT

38. Plaintiffs re-allege and incorporate the allegations stated above as if fully restated below.

39. As described in detail above, Defendant Bykowski's systematic scheme of targeting BlackOxygen Organics through a barrage of false, misleading and harassing negative publicity on the internet, social media and through unsolicited text, email and voice messages to BlackOxygen Organics Brand Partners involve the publication of disparaging words concerning BlackOxygen Organics' economic interests.

40. The content of this publicity on the internet and social media websites Facebook and YouTube and in Bykowski's phone calls and voice messages are false and published with malice. Bykowski has made and continues to make these publications without privilege, and these actions have caused special damages to BlackOxygen Organics in the form of (i) loss of business reputation, value and goodwill; (ii) lost profits; and (iii) costs associated with responding to the systematic and targeted campaign of negative publicity created by Bykowski.

COUNT 2: TORTIOUS INTERFERENCE WITH EXISTING CONTRACTUAL RELATIONSHIPS

41. Plaintiffs re-allege and incorporate the allegations stated above as if fully restated below.

42. At all relevant times Defendant Bykowski knew and currently knows that BlackOxygen Organics has contractual relationships with BlackOxygen Brand Partners. By the actions described above, Defendants have utilized improper means to intentionally and maliciously

interfere with BlackOxygen's contractual relationships with BlackOxygen Brand Partners.

43. The Defendant's conduct was without legal justification and intended to harm BlackOxygen and interfere with its contractual relationships with its Brand Partners.

44. The BlackOxygen Entities have suffered actual harm as a result of the Defendant's actions in the form of (i) lost profits; and (ii) loss of business reputation, value and goodwill.

COUNT 3: TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS

45. Plaintiffs re-allege and incorporate the allegations stated above as if fully restated below.

46. Defendant Bykowski's false and malicious public attacks against BlackOxygen Organics have tortiously interfered with the companies' prospective business relationships. Defendants' extortion campaign has prevented BlackOxygen Organics from entering into a business relationship with one or more prospective Brand Partners or one or more prospective customers

47. Defendant's pattern of conduct as described above demonstrates that he embarked on a campaign with a conscious desire to prevent BlackOxygen Organics from entering into business relationships with prospective Brand Partners and customers and/or with knowledge that interference with BlackOxygen Organics' prospective business relationships was certain or substantially certain to occur.

48. BlackOxygen Organics have suffered actual harm as a result of Defendants' actions in the form of (i) the loss of prospective Brand Partners and customers; and (ii) lost profits.

COUNT 4: DEFAMATION AND DEFAMATION PER SE

49. Plaintiffs re-allege and incorporate the allegations stated above as if fully restated below.

50. Defendant Bykowski defamed BlackOxygen Organics, Marc Saint-Onge and Carlo Garibaldi by publishing false statements about them in various public forums, including Facebook and YouTube, and to third parties.

51. Defendant published these false statements with knowledge that they were false, with reckless disregard for their truth or falsity, or, at a minimum, negligently. Moreover, because certain statements by Defendant (i) falsely accuse BlackOxygen Organics, Mr. Saint-Onge of engaging in criminal conduct and dishonesty; and (ii) falsely accuse Mr. Garibaldi of marital infidelity, sexual misconduct and inappropriate sex acts; these statements are defamatory *per se*.

52. The Plaintiffs have suffered substantial economic and non-economic harm as a result of Defendant's false statements, including harm to their respective reputations and to BlackOxygen Organics' business reputation and goodwill.

COUNT 5: REQUEST FOR PERMANENT INJUNCTION

53. Plaintiffs re-allege and incorporate the allegations stated above as if fully restated below.

54. Defendant Bykowski has demonstrated a willingness to cause irreparable harm to the Plaintiffs' respective reputations, property and rights. Their conduct as described above is without right or entitlement in that it amounts to defamation, disparagement and tortious interference with BlackOxygen Organics' contractual relationships and prospective business relations.

55. Plaintiffs have been, and will continue to be, damaged and injured by the Defendant's conduct by loss of reputation for fairness, quality and honesty, and the loss and permanent injury to its goodwill and the value of the Brand Partner network amassed by BlackOxygen Organics since the company's inception. Similarly, Messrs. Saint-Onge and Garibaldi have been and will continue to be damages and injured by Defendant's conduct by injury

to their respective reputations.

56. Monetary damages alone will not compensate the Plaintiffs for the injuries described above. The injuries and losses are continuing. The property and rights involved are unique and irreplaceable, such that it will be impossible to accurately measure, in monetary terms, the damages cause by the Defendant's conduct. Moreover, the damages suffered by the Plaintiffs caused by the Defendant's conduct are likely to exceed the financial worth of Bykowski so as to prevent any adequate compensation to the Plaintiffs.

57. For the reasons stated in this pleading, the Plaintiffs requests that the Court issue a permanent injunction requiring Bykowski to permanently remove all statements adjudged to be defamatory or disparaging about BlackOxygen Organics, Mr. Saint-Onge and Mr. Garibaldi that Defendant has published in any medium, including the internet, and specifically on Facebook and YouTube.

REQUEST FOR EXEMPLARY DAMAGES

58. Plaintiffs re-allege and incorporate the allegations stated above as if fully restated below.

59. A plaintiff who successfully prosecutes a suit by proving malice by clear and convincing evidence can recover exemplary damages under Section 41.003(a)(2) of the Texas Civil Practice and Remedies Code. Plaintiffs seeks exemplary damages for the malicious business disparagement, tortious interference and defamation by Bykowski described above.

ATTORNEY'S FEES

60. In addition to the above relief, Plaintiffs seeks recovery of their reasonable and necessary attorney's fees in this cause. Plaintiffs seek recovery of their reasonable and necessary attorney's fees for the prosecution of this action through trial, post-trial and appeals to the Fifth Circuit Court of Appeals or the United States Supreme Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs 11578243 Canada, Inc. d/b/a BlackOxygen Organics, BlackOxygen Organics USA, Inc., Marc Saint-Onge and Carlo Garibaldi request that Defendant David Bykowski be cited to appear, and that the Court, upon final hearing or trial, enter judgment in favor of Plaintiffs granting the following relief:

- (1) Judgment in favor of Plaintiffs against Defendants Bykowski for monetary damages and exemplary damages as requested above;
- (2) Permanent injunctive relief as requested above;
- (3) Judgment that Plaintiffs recover pre-judgment and post-judgment interest at the highest rate allowed by law;
- (4) An award of all attorney's fees and costs; and
- (5) All further relief to which Plaintiffs may be justly entitled.

Date: September 16, 2021

Respectfully Submitted,

SCHEEF & STONE, L.L.P.

By: /s/ C. Brenton Kugler

C. Brenton Kugler

State Bar No. 11756250

brent.kugler@solidcounsel.com

Andrea E. Cook

State Bar No. 24085969

andrea.cook@solidcounsel.com

500 N. Akard Street

Suite 2700

Dallas, Texas 75201

(214) 706-4200

(214) 706-4242 (Telecopy)

**ATTORNEYS FOR PLAINTIFFS 11578243
CANADA, INC., D/B/A BLACKOXYGEN
ORGANICS, BLACKOXYGEN ORGANICS
USA, INC., MARC SAINT-ONGE AND
CARLO GARIBALDI**